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IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 1482

FRANK BOLETTIERI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

FRANK BOLETTIERI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement

Petitioner, Frank Bolettieri, respectfully prays that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to review its affirmance of a judgment of the United States District Court for the Eastern District of New York which convicted him of purchasing a narcotic drug (methadon) which was not in or from the original package bearing tax stamps (I.R.C. §4704(A)). The Defendant-Petitioner was sentenced to a five year term of imprisonment pursuant to the provisions of Title 18 U.S.C. 4208(a)(2).

Opinion Below

No opinion was written by the Court below which affirmed the judgment unanimously on the 6th of June, 1971.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Court below affirmed the judgment of conviction without opinion on the 6th of June, 1971, and a timely motion for rehearing was then made as well as for a rehearing *en banc*. The Court of Appeals for the Second Circuit on the 17th day of February, 1971, denied both motions. Copies of these orders are annexed as Exhibits to this petition. It should be noted, however, that the Court of Appeals stayed the issuance of the Mandate herein and continued Petitioner on bail pending certiorari.

Questions Presented

1. Whether federal narcotics agents violated Petitioner's rights under the Fourth Amendment by arresting him upon "suspicion" only and then proceeding to seize and search a package which was contained in a motor vehicle belonging to a third person which was being operated by Petitioner?

2. Whether an incriminating statement obtained from Petitioner as a result of an unlawful arrest and unreasonable search and seizure should have been suppressed?

Introductory

The Petitioner herein has been a career Post Office employee (letter carrier) for over eleven years and was severed from his employment within the last few months. He is 49 or 50 years of age, married and a father, and was honorably discharged from military service. He was never previously convicted of any crime.

The indictment herein was based upon a single count and charged that Petitioner purchased a quantity of methadon which was not in its original stamped package bearing revenue stamps as required by law.

The Facts of the Case in Brief

The trial was preceded by a hearing pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure wherein Petitioner sought to suppress a quantity of methadon which was seized from a vehicle belonging to a third person on the 15th day of June, 1968, which Bolettieri had been operating at that moment.

Bolettieri was a letter carrier and had been for a number of years prior to his arrest. The sole government agent who testified at the suppression hearing was John O'Brien of the Bureau of Narcotics who stated that he had heard that "Franky Butch" of Queens was dealing in narcotics (3-4).*

This information came from an informer whose identity was not disclosed during the hearing. One of the places suspected as a narcotics distribution location was Ponce Funeral Parlor which Bolettieri had been seen to enter on several occasions. The peculiar and paradoxical fact, however, was that this funeral parlor was on Bolettieri's regular route as a letter carrier and, therefore, it was not at all odd for him to enter the premises (6-12). Agent O'Brien conceded that there was nothing in Bolettieri's background

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* Numerals in parenthesis refer to pages of the official court reporter's minutes of trial. Numerals preceded by the letter "A" refer to pages of the Appendix in the Court below.

to suggest that he was in any way connected with drugs either as a pusher or a user.

Supposedly the agent already had sufficient probable cause to arrest Bolettieri because of an observation made on May 13, 1968, but the agent declared that he neither sought an arrest warrant nor a search warrant (14, 18, 19).

The reliability of the informer was doubtful at best (A34-A38; A114-A115).

On the 15th of June, 1968, O'Brien stated that he, together with other agents, had kept Bolettieri under observation and had seen him conversing with one Tommaro and two brothers known as the Moscarelli brothers. O'Brien declared that these latter persons were suspected of being involved with narcotics (28; 65).

The agent declared that he observed the Moscarelli brothers and Tommaro deliver a package to Bolettieri shortly before his arrest in front of the Moscarelli Funeral Parlor (29-30).

No arrest was made, however, until Bolettieri had proceeded several blocks driving an automobile belonging to another person. O'Brien admitted that he did not know what the package contained and only had a hunch or "idea" that it may have contained narcotics (109).

The agents stopped Bolettieri's car at the point of a gun but never searched him personally. They had no search warrant, but seized the package and opened it and claimed they were able to tell immediately that it contained methadon *although no chemical analysis was made at this time.* Bolettieri was under arrest and allegedly made an incrimi-

nating statement indicating that he was aware of the fact that narcotics were contained in the package. It is significant to note that agent O'Brien admitted that he personally had no idea of what was contained in the package itself until after it was opened. It is also submitted that even when the package was opened it would have been impossible to positively know what the package contained because there was no chemical analysis made until some time later.

The Petitioner himself took the stand in his own defense and, of course, categorically denied all the allegations and stated that he was completely unaware of anything involving narcotics.

It was undisputed that after agent O'Brien and his cohorts had observed the alleged passing of the bag containing methadon by Tommaro and the Moscarelli brothers to Petitioner, they effectuated the arrest not at once, but minutes later, about four blocks away. O'Brien stated that he really did not know what was in the bag until he opened it and then, incredibly, admitted that he did not search the Defendant-Petitioner personally at the time of the arrest nor did the agents return to the Moscarelli Funeral Parlor to arrest Tommaro and the Moscarelli brothers against whom, presumably, they would have had solid evidence of criminality if O'Brien was telling the truth. So far as is known, no arrest of Tommaro or the Moscarelli brothers was ever effectuated.

In addition, the authorities permitted Bolettieri to return home following the arrest. In short, it would appear that until a chemical analysis had been made, the agents really did not know what was in the bag at all and the arrest and search and seizure were clearly improper.

O'Brien further testified that only subsequently was the package taken to a United States chemist and analyzed, at which time it was found to contain a kilo of methadon.

With respect to the alleged confession, O'Brien testified that he explained the Constitutional rights under the *Miranda* rule to Bolettieri after his arrest and that Bolettieri then admitted that he obtained the narcotics from the Moscarelli garage at the funeral parlor and admitted that the package contained "junk" (A193-A195).

POINT ONE

The petitioner herein was the victim of an unlawful search and seizure and an unlawful arrest which precipitated an alleged incriminating statement at the point of a government agent's gun. The trial court should have suppressed both the evidence seized (Methadon) and the confession.

The facts of this case are extremely bizarre and this Court cannot help but question the credulity of the Government's single witness at the suppression hearings*

The uncontradicted facts reveal that the Petitioner was arrested on the 15th of June about four blocks from the alleged scene of the crime, namely, the garage attached to the Moscarelli Funeral Parlor. Agent O'Brien declared that he observed the actual passage of a package to Bolettieri at that time but made no arrest whatsoever despite the fact that he

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* We do not dwell upon the trial proper since once the Trial Court decided to admit the evidence seized and the confession obtained, the trial was a virtual inquest. It is, therefore, the suppression hearings which are the crux of this petition.

claimed that he had probable cause to do so. Instead, the agents permitted Bolettieri, driving someone else's vehicle, to proceed about four blocks distance and then, at the point of a gun, suddenly apprehended him. The agents were not in uniform.

O'Brien declared that no search of Bolettieri's person was made at this time but only the package itself was seized. He stated that after the package was opened it was determined that it contained methadon although he testified that this finding was not arrived at until quite some time later when a United States chemist finally analyzed the contents (A32-A33).

No effort was made to return the short distance to the funeral parlor and arrest the primary targets of the investigation, namely, the Moscarelli brothers and Tommaro. As a matter of fact, they were never arrested in connection with this crime so far as we know.

To add to the "story" of agent O'Brien, we call the Court's attention to the fact that he admitted that Bolettieri was then permitted to leave and return home so that he could attend a party and was asked to return two or three days later.

It is important at this juncture to note that the agent admittedly had no knowledge of the contents of the package or bag which was given to Bolettieri. It thus seems obvious that there was no probable cause to believe that narcotics were actually contained in this package at the time it was handed over to Bolettieri. The arrest of Bolettieri in a car not belonging to himself did not warrant a search of anything other than his person for the purpose of determining whether

or not he was armed. (See *Vale* v. *Louisiana,* 399 U.S. 30 (1970). See also *Brinegar* v. *United States,* 338 U.S. 160; *Aguilar* v. *Texas,* 378 U.S. 108; *Terry* v. *Ohio,* 392 U.S. 1, and *Spinelli* v. *United States,* 393 U.S. 410).

There apparently was more than sufficient time to have obtained an arrest warrant in this case and a search warrant could have been obtained to search the Moscarelli Funeral Parlor if indeed one is to believe the testimony of agent O'Brien that he had probable cause to make an arrest over a month previously. (See *United States* v. *Ventresca,* 380 U.S. 102).

Although this arrest antedates *Chimel* v. *California,* 395 U.S. 752, nevertheless, this Court has noted in *Vale* v. *Louisiana,* supra, and in *Van Cleef* v. *New Jersey,* 395 U.S. 814, as well as *Shipley* v. *California,* 395 U.S. 818, 819, that even prior to *Chimel,* an arrest warranted a search only of the *immediate* area and certainly did not authorize the search of a vehicle not belonging to the Petitioner. The vehicle itself could have been impounded and a search warrant obtained. (*Vale* v. *Louisiana,* supra; see also *Stoner* v. *California,* 376 U.S. 483, 486).

The search here was not by consent since the officers were holding weapons at the time of the arrest and gave Bolettieri no choice about the matter (*Zap* v. *United States,* 328 U.S. 624, 628).

The officers were no longer responding to an emergency since they had Bolettieri and the vehicle in custody and, therefore, could have obtained a search warrant (*United States* v. *Jeffers,* 342 U.S. 48, 52, and *McDonald* v. *United States,* 335 U.S. 451, 454). The goods that were seized were not in the process of destruction (*Schmerber* v. *California,* 384 U.S. 757, 770-771).

Katz v. *United States,* 389 U.S. 347, 357, narrowly delineates the area and circumstances wherein a search can be made without a warrant. Certainly the officers had no basis to make an arrest for possession of untaxed narcotics when Bolettieri was taken into custody because there was no chemical analysis as yet and the agents admitted that they did not know the contents of the bag at that time.

We therefore now come to the other aspect of this matter, namely, the illegal interrogation and confession which was obtained from the Petitioner following his arrest at the point of a gun. The search produced a bag containing a substance which was *later analyzed* by a chemist and found to contain methadon. Once the arrest was effectuated, however, and the search conducted, then and only then were questions propounded to Bolettieri who, after all, was a career mailman and had never previously been involved with narcotics or any other crime. Thus this case falls within the purview of *Wong Sun* v. *United States,* 371 U.S. 471, which condemned the use of a confession which was precipitated by an illegal search and seizure.

The search itself, as has been noted already, was apparently improper since the car, the package and the Petitioner were already in custody (*Preston* v. *United States,* 376 U.S. 364).

The Government is saddled with the burden of proving that the unlawfully obtained evidence did not induce the confession under attack (*Harrison* v. *United States,* 392 U.S. 219 (1968)).

In view of the foregoing circumstances, it is submitted that the agents herein acted unconstitutionally within the purview of the Fourth Amendment in conducting the un-

warranted search and seizure. The arrest herein was for possession of untaxed narcotics but this fact was not known until after a chemical analysis was made or at least until after a confession had been wrested from the Petitioner.

In view of the foregoing, the Petition for Certiorari should be granted and, ultimately, the evidence and confession should be ordered suppressed.

CONCLUSION

The petition for certiorari should be granted and the evidence seized, as well as the confession obtained, should be suppressed.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioner

APPENDIX

Order of United States Court of Appeals Denying Rehearing En Banc

35024

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRANK BOLETTIERI,

Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellant and no active circuit judge having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD
Chief Judge

February 17, 1971

Order of United States Court of Appeals Denying Petition for Rehearing and Granting Stay of Mandate

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

FRANK BOLETTIERI,

Defendant-Appellant.

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate and to continue bail pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

ORDERED that petition for a rehearing be denied, and it is further

ORDERED that the motion to stay the issuance of the mandate and to continue bail pending application for a writ of certiorari to the Supreme Court of the United States be granted pursuant to Rule 41(b).

J. EDWARD LUMBARD
LEONARD P. MOORE
J. JOSEPH SMITH
Circuit Judges

February 17, 1971

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1482

FRANK BOLETTIERI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on a one-count indictment charging the purchase of 997 grams of methadone not in or from the original stamped package, in violation of 26 U.S.C. 4704(a) (A. 1a, 2a).[1] He was sentenced to imprisonment for five years pursuant to 18 U.S.C. 4208(a)(2) (A. 1a). The court of appeals affirmed unanimously without an opinion.

Petitioner's contentions relate solely to his allegedly

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[1] "A." refers to the printed Appendix filed with the Clerk of this Court.

unlawful arrest and the evidence seized and incriminating statements made by him in connection therewith. At the hearing on petitioner's pretrial motion to suppress,[2] agent O'Brien of the Federal Bureau of Narcotics and petitioner were the only witnesses. The testimony showed that in the latter part of January 1968, an informant told agent O'Brien that one Frankie Butch was trafficking in heroin (A. 6a).[3] The informant furnished Frankie's telephone number, which was listed in petitioner's name (A. 6a). O'Brien then initiated a surveillance of petitioner, which continued until his arrest on June 15, 1968 (A. 120a-121a). During this period agents observed petitioner, a letter carrier, making numerous stops of two hours or more at the Ponce Funeral Home, which had been frequented by members of the Brooklyn underworld and was the subject of an active file at the Bureau of Narcotics (A. 9a-10a, 12a-13a, 124a).

On May 13, 1968 petitioner, followed by agent O'Brien, drove from his home to a diner and parked next to an automobile registered to one John Tommaro (A. 16a-17a). O'Brien knew of this registration and that Tommaro's employer was on the National Violator List of top narcotics offenders (A. 17a). In the diner O'Brien and another agent overheard petitioner ask Tommaro if he had the "stuff."[4] When Tommaro re-

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[2] Petitioner does not challenge the trial proceedings themselves.

[3] The informant had previously given O'Brien information that had resulted in one conviction and three arrests; he was to be used in other cases still pending at that time (A. 35a, 38a).

[4] O'Brien testified that he understood the word "stuff" to mean narcotics (A. 69a-70a).

plied that he had brought it, petitioner asked how good it was. Tommaro answered, "Take a sample and test it" (A. 18a). The two then went outside, where Tommaro took from his car a white package and gave it to petitioner (A. 18a-19a, 78a). The agents followed petitioner to the home of his brother-in-law, who took the package from petitioner's car into the house (A. 20a, 80a-82a). O'Brien did not then arrest petitioner since he hoped to reach the ultimate source of the narcotics (A. 20a-21a).

In early June 1968 the informant told O'Brien that petitioner would purchase narcotics from Tommaro at an unspecified funeral parlor (A. 24a, 82a, 84a). The informant advised that petitioner and the manager of the Ponce Funeral Home had quarreled and that the Ponce Home was no longer used for narcotics traffic (A. 21a-22a). The Federal Bureau of Narcotics believed that the Moscarelli Funeral Home in Brooklyn, which was reputed in the 1950's and 1960's to be a center for narcotics activities, was presently being used for that purpose (A. 22a-23a). Accordingly a surveillance was established of the Moscarelli Home.

On June 15 the informant told O'Brien that petitioner was going to purchase a quantity of drugs that day (A. 26a, 87a-88a). At about 2:00 p.m. petitioner drove his car from his home to a diner in Queens where he met two men (A. 26a, 89a-90a). After a short conversation with them petitioner drove away in another car, a 1963 Chevrolet (A. 26a-27a, 90a-91a). Other agents followed petitioner, and O'Brien drove to the Moscarelli Home, where he saw Tommaro and the

Moscarelli brothers in front (A. 27a-28a). When O'Brien walked past these men he overheard Louis Moscarelli say, "Where the hell is Frankie? I hate to keep that stuff too long". Louis Moscarelli then drove off (A. 28a, 96a).

O'Brien was informed by the agents following petitioner that he was then around the corner from the funeral home. O'Brien saw petitioner sitting in the Chevrolet counting a large number of bills (A. 28a-29a, 98a-99a). After O'Brien walked back to the funeral home he saw Louis Moscarelli return, remove from the trunk of his car a paper bag with a red emblem on its side, and enter the home (A. 29a, 101a-102a). A few minutes later Louis came out of the home without the bag and rejoined Tommaro and his brother Ralph (A. 30a, 95a-96a). Petitioner drove up, got out of his car, and all four went into the home (A. 30a-31a). As they entered the building O'Brien heard one Moscarelli brother say to petitioner, "Next time be on time or get the package elsewhere" (A. 30a).

Shortly afterward Louis Moscarelli came out of the home with a paper bag and walked into the funeral parlor garage. Petitioner drove the Chevrolet about halfway into the garage and was seen accepting a package from Louis Moscarelli (A. 31a, 102a, 104a). Petitioner then drove away and was stopped by two government cars a few blocks from the funeral home (A. 31a-32a, 112a-113a). Agent O'Brien arrested petitioner, removed him from the car, and seized a paper bag with a red emblem from the floor of the car next to the driver's side (A. 32a). The agents did not have an

arrest or search warrant (A. 4a, 121a). Subsequent chemical analysis showed that the package contained methadone (A. 32a).

Agent O'Brien placed petitioner in a government car, and told him that he (O'Brien) was a federal agent and that petitioner was under arrest for violation of the federal narcotics laws. O'Brien advised petitioner: "You have the right to remain silent, you do not have to say anything to me and you have the right to have a lawyer—you have the right to have a lawyer at any time during any proceeding and should you not have the money to afford a lawyer, the Court will appoint one for you." Petitioner laughed and said, "Yeah, just like they do in the Sunday night movies." O'Brien asked what was in the bag, to which petitioner replied, "You know, it's junk" (A. 189a). When petitioner inquired as to what he could do to help himself, the agent answered that he wanted to get Louis Moscarelli. Petitioner agreed to cooperate in this. Petitioner then related how he had purchased the narcotics from Louis Moscarelli for $5,500 (A. 190a-194a).[5]

The district court denied the motion to suppress the seized narcotics and petitioner's post-arrest statements (A. 184a, 247a). The court concluded that there was probable cause for the arrest (A. 184a):

* * * The totality of what [agent O'Brien] saw

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[5] At the suppression hearing petitioner testified on his own behalf that he had not been warned of his constitutional rights (A. 216a-217a) and that he did not tell any government agent he had purchased the narcotics in question (A. 219a).

> over the period in which he saw it amounted to overwhelming evidence that the time to act had come and that it would have been unreasonable, without some satisfactory explanation, for Mr. O'Brien and his fellows not to have moved in and [do] what they did when they did it.

Petitioner asserts that his warrantless arrest was without probable cause and therefore unlawful, and that the district court erred in not suppressing the evidence seized and his post-arrest statement. But the circumstances detailed above plainly established probable cause for petitioner's arrest without a warrant and the incident seizure of the package from the immediate area petitioner had occupied as driver of the car. See 26 U.S.C. 7607(2); *Brinegar* v. *United States,* 338 U.S. 160; *Carroll* v. *United States,* 267 U.S. 132; *United States* v. *Acarino,* 408 F. 2d 512 (C.A. 2), certiorari denied, 395 U.S. 961.

Nor is there substance to petitioner's claim that his post-arrest incriminating statements were made as a result of an illegal interrogation and were given involuntarily (Pet. 9). Immediately following his arrest petitioner was advised of his constitutional rights in accordance with the requirements of *Miranda* v. *Arizona,* 384 U.S. 436. According to agent O'Brien, petitioner indicated that he understood these rights before he made the incriminating statements (A. 189a, 190a, 194a). The trial court obviously disbelieved petitioner's testimony to the contrary, finding that petitioner's statements were "* * * neither coerced nor

obtained without adequately advising the defendant of his rights * * *" (A. 247a).[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1971.

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[6] Although there was testimony that agent O'Brien drew his gun at the time of petitioner's apprehension (A. 115a), there is no evidence that petitioner's later incriminating statements were made at the "point of a gun," as the petition suggests (Pet. 9).

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